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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 232

CITY AND COUNTY OF HONOLULU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The District Court did not write an opinion. Its remarks at the close of the trial appear at pages 112-114 of the record. The opinion of the Court of Appeals (R. 125-131) is reported at 188 F. 2d 459.

JURISDICTION

The judgment of the Court of Appeals was entered April 13, 1951 (R. 132). A petition for rehearing was denied May 17, 1951 (R. 133). The petition for a writ of certiorari was filed Au-

gust 10, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

QUESTION PRESENTED

Whether the United States is liable for more than nominal damages for the taking of streets for which no substitutes are necessary, merely because the municipality holds fee title to such streets and has the unexercised power to discharge the public easement therein.

STATEMENT

On January 8, 1946, the United States instituted proceedings to condemn the fee simple title to all of the streets, roads and highways located in Pearl City Peninsula, Oahu, Territory of Hawaii, except Lehua Avenue, the main highway running through the center of the peninsula. (R. 2-8, 9-38, 43-44, 114).[1] This property was taken for use in connection with the Pearl Harbor Security Perimeter Acquisition. On March 31, 1947, a declaration of taking was filed and estimated just compensation of $2.00 was deposited with the court (R. 45-59).

On July 11, 1949, in a hearing by the court with-

[1] Section 6112 of the Revised Laws of Hawaii, 1945, provides that the fee title to all public highways is in the Territory of Hawaii. The Territory and the City and County of Honolulu stipulated that for the purposes of this proceeding, the City and County of Honolulu shall be deemed to be the owner of the fee and improvements of the streets and highways, and entitled to compensation for the taking thereof (R. 60-62). The United States joined in this stipulation for the sole purpose of recognizing the agreement (R. 61). Petitioner's statement (Pet. 15) in regard to the stipulation is obviously incorrect. (See R. 126-127.)

out a jury (R. 72-115), petitioner contended that it was entitled to substantial compensation for its roads, streets and highways for the reason that the easement could be extinguished by its Board of Supervisors, after which the land on which the streets were constructed could be sold for a substantial consideration (R. 78, 86-87, 96-97, 107-108, 114). It was conceded that there was no necessity for substitute roads (R. 114; see also Pet. 3, 13). It was also conceded that at the time of the taking petitioner evinced no intent to cause the abandonment of such roads, streets and highways (R. 111; see also Pet. 3, 13). Upon these facts, the court, following the established rule, held that the petitioner was entitled to only nominal compensation (R. 112-114). An order fixing just compensation at One Dollar ($1.00) was entered (R. 64-66), from which an appeal was taken by petitioner (R. 69). On April 13, 1951, the appellate court filed an opinion and entered its judgment affirming the order of the district court (R. 125-132).

ARGUMENT

The decision of the Court of Appeals is correct and does not conflict with any applicable decision of a federal court. The federal courts have uniformly held that the constitutional requirement of just compensation for the taking of streets and highways is satisfied by the cost of furnishing a substitute way if relocation is necessary to serve persons outside the condemned area, or by only

nominal compensation where, as here, there is no necessity for such relocation. *State of California* v. *United States,* 169 F. 2d 914, 924 (C.A. 9); *United States* v. *City of New York,* 168 F. 2d 387 (C.A. 2); *United States* v. *State of Arkansas,* 164 F. 2d 943 (C.A. 8); *United States* v. *Los Angeles County,* 163 F. 2d 124 (C.A. 9); *Woodville* v. *United States,* 152 F. 2d 735 (C.A. 10), certiorari denied, 328 U.S. 842; *United States* v. *Des Moines County,* 148 F. 2d 448 (C.A. 8), certiorari denied, 326 U.S. 743; *Mayor and City Council of Baltimore* v. *United States,* 147 F. 2d 786 (C.A. 4); *Jefferson County* v. *Tennessee Valley Authority,* 146 F. 2d 564 (C.A. 6), certiorari denied, 324 U.S. 871, rehearing denied, 324 U.S. 891. Under this well-established rule, it is immaterial whether the municipality owns the fee in the roadbed or merely holds title to an easement as trustee for the benefit of the public. *State of California* v. *United States,* 169 F. 2d 914, 924 (C.A. 9); *United States* v. *City of New York,* 168 F. 2d 387 (C.A. 2).

Contrary to petitioner's contention (Pet. 14-15, 19, 21-24), it is equally immaterial that it could abandon the streets and thereupon deliver a merchantable title to a purchaser. Such authority to abandon exists in governmental units in the States of California and New York (Sec. 837 Deering's Cal. Codes; Sec. 383-2.0 Administrative Code of City of New York, page 416), but that fact did not change the result in *State of California* v. *United*

States, 169 F. 2d 914 (C.A. 9), and *United States* v. *City of New York,* 168 F. 2d 387 (C.A. 2). As a matter of fact, in the present case there was "no intent to cause the abandonment of such roads, streets and highways." (Pet. 3, 13; R. 111.) Hence, the possibility of such abandonment is too speculative to be considered. *Chicago, Burlington &c. R'd.* v. *Chicago,* 166 U.S. 226, 250. Cf. *People of Puerto Rico* v. *United States,* 132 F. 2d 220 (C.A. 1), certiorari denied, 319 U.S. 752.

None of the cases relied upon by petitioner (Pet. 6, 20-24) lead to a different conclusion. In *United States* v. *Benedict,* 280 Fed. 76 (C.A. 2), affirmed on other grounds, 261 U.S. 294, the question here involved was not reached, since the trial proceeded on the assumption that the unopened streets should be valued in the same way as adjoining or abutting land. Moreover, whatever authority this case once had has been dissipated by the holding of the same court in *United States* v. *City of New York,* 168 F. 2d 387 (C.A. 2). The cases of *Olson* v. *United States,* 292 U.S. 246, and *Brown* v. *United States,* 263 U.S. 78, did not involve compensation for the taking of streets, roads and highways and, consequently, cannot be said to be in conflict with the doctrine peculiar to such takings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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